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For The Northern Mariana Islands
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

ROSARIO DLG KUMAGAI

Plaintiff,

v.

PAMELA BROWN, a.k.a. PAMELA BROWN
BLACKBURN, personally and in her official
capacity as the Attorney General for the
Commonwealth of the Northern Mariana Islands;
FERMIN M. ATALIG, personally and in his
official capacity as Secretary of Finance;
COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS; MARIA LOURDES
SEMAN ADA, personally and in her official
capacity as Executive Director for the
Commonwealth Development Authority,
COMMONWEALTH DEVELOPMENT
AUTHORITY; BANK OF GUAM; and JOHN
DOES ONE thru TEN.

Defendants.

CIVIL ACTION NO. 05-0037

**AMICUS BRIEF ON THE STATUS OF
THE COMMONWEALTH
DEVELOPMENT AUTHORITY.**

Date: May 18, 2006

Time: 9:00 a.m.

Judge: Hon. Alex R. Munson

NOW COMES the Office of the Attorney General, in the capacity of amicus curiae, and
files the following brief pursuant to the Court's order of March 1, 2006. In that order the Court
asked the Office of the Attorney General to prepare a brief describing its position on the
question of whether the Commonwealth Development Authority ("CDA") is an arm of the

ORIGINAL

1 government. While not stated explicitly in the Court's order, the Office of the Attorney General
 2 has assumed that the context for the Court's question is whether CDA is entitled to sovereign
 3 immunity against the § 1983 claims in this case. For the reasons set out in detail below, it is the
 4 opinion of the Office of the Attorney General that CDA is an arm of the CNMI government for
 5 the purpose of § 1983 immunity.

6 LEGAL STANDARD

7 To determine whether a CNMI agency is an arm of the government for the purpose of §
 8 1983 immunity, the Ninth Circuit has applied a five-factor test:

9 (1) whether a money judgment would be satisfied out of state funds, (2) whether
 10 the entity performs central governmental functions, (3) whether the entity may
 11 sue or be sued, (4) whether the entity has the power to take property in its own
 name or only the name of the state and (5) the corporate status of the entity.

12 *Aguon v. Commonwealth Ports Authority*, 316 F.3d 899, 901 (9th Cir. 2003) (citing *Mitchell v.*
 13 *Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988) (internal quotation
 14 marks omitted.) The *Aguon* case is particularly instructive because it concerned another agency
 15 of the CNMI government, the Commonwealth Ports Authority. In that case, the Ninth Circuit
 16 applied all five factors, but gave particular weight to the first two. *Id* at 901-904. After going
 17 through a thorough analysis, the court concluded that the Ports Authority was an arm of the
 18 Commonwealth government for the purpose of § 1983 immunity. *See id.*

19 I. A Judgment Against CDA would Impact Central Government Functions

20 In determining whether CDA is an arm of the CNMI government for the purpose of §
 21 1983 immunity, the first and most important factor is whether a money judgment against CDA
 22 would "impact" the CNMI treasury. *Aguon*, 316 F.3d at 202. The "impact" is not limited to
 23 direct liability, but instead also applies anywhere the CNMI is a "real, substantial party in
 24 interest." *Id.* In particular, the treasury is impacted when a large money judgment against the
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1 agency in question would prevent it from performing “central government functions,” without
2 additional and extraordinary appropriations from the legislature. *Id.*

3 In this case, CDA performs essential government functions relating to the economic
4 development of the Commonwealth. More specifically, its “Development Banking Division” is
5 charged with, among other things, achieving “the greatest possible return, in terms of economic
6 development on the funds made available to the Commonwealth by the United States...and
7 [serving] as the Northern Marianas development bank identified in N.M.I. Const. art. XI §
8 6(c).” 4 N. Mar. I. Code § 10102(a)(3) & (a)(5) (1999). The other half of CDA, its
9 “Development Corporation Division,” is charged with identifying and assisting business and
10 commercial enterprises of value to the Commonwealth and with serving “as the economic
11 development loan fund agency for qualified private sector enterprises.” *Id.* at § 10102(b)(1)-(3).
12 To go along with this serious responsibility to promote the economic development of the
13 CNMI, CDA has the power to borrow money, including issuing bonds, and to “pledge the full
14 faith and credit of the Commonwealth,” in the process. *Id.* at 10203(a)(18).

15 Given the serious and vital nature of CDA’s work, if CDA were “faced with a large
16 money judgment which it could not pay, the Commonwealth would be compelled to protect its
17 island economy by responding with an appropriation to provide the citizens of the
18 Commonwealth with essential...services.” *Aguon*, 316 F.3d at 903. As such, the CNMI is a
19 real in interest here and the first two factors set forth in *Aguon*, weigh heavily in favor of
20 finding that CDA is an arm of the CNMI government for the purposes of § 1983 immunity.

21 **II. CDA is an Entity that can Sue and be Sued, but this Factor is Less Important**

22 The third factor is the power to sue or be sued. CDA is empowered both to sue and be
23 sued in its own name under the enabling act. 4 N. Mar. I. Code § 10203(a)(4) (1999). This
24 weighs against a finding that CDA is an arm of the government for the purpose of § 1983
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1 immunity, but [t]his factor...is entitled to less weight than the first two.” *Aguon*, 316 F.3d at
2 903 (citation omitted).

3 III. CDA is Allowed to Hold Property in its Own Name, but also to Pledge the Credit of the
4 Government

5 The fourth factor is whether the agency can hold property in its own name. In this case,
6 CDA is so empowered. 4 N. Mar. I. Code § 10203(a)(5) (1999). However, as mentioned
7 above, CDA also has the power to pledge the full faith and credit of the entire government. *Id*
8 at § 10203(a)(18). Because there is a balance between CDA’s power to take property in its own
9 name (a power not usually held by non-autonomous government agencies), but does have the
10 power to bind the entire Commonwealth government (a power that is usually held by such
11 agencies). Therefore, this factor does not weigh heavily on either side. *See Aguon*, 316 F.3d at
12 903. (Holding that Commonwealth Ports Authority’s power to hold property in its own name
13 was balanced out by its power to take property by eminent domain).

14 IV. CDA is a Public Corporation Subject to Some Oversight from the Legislature

15 The fifth and final factor is the corporate status of the entity. In this case, CDA is a
16 public corporation created with the general purpose of stimulating economic development for
17 the benefit of the people of the Commonwealth. *See* 4 N. Mar. I. Code § 10201(a). Its
18 activities are controlled by a Board of Directors, who are appointed by the Governor, subject to
19 the advice and consent of the Senate. *Id* at § 10301(b). The Directors serve a term of four years
20 and can be removed only for cause. *Id* at §§ 10301(b) and 10304.

21 CDA has significant limitations on its expenditures and other activities. CDA is
22 empowered to draw up its own budget and to pay its own administrative expenses out of its own
23 funds, but these expenditures are limited to 2% of CDA’s total assets and must conform to the
24 budget it is required to submit to the Governor and the legislature. *Id* at § 10402(f). (Note that
25 this budget submission is for the information of the recipients only and does not require their

1 approval). *Id.* In addition, the CDA must “adopt, and update as necessary, a statement of
2 development objectives and priorities,” and these are subject to the approval of the Governor
3 and the legislature. *Id.* at § 10402(b). Finally, the issuance of bonds or other obligations
4 exceeding \$5 million requires the consent of the legislature. *Id.* at § 10204(b)(4).

5 The work of the *Aguon* court is instructive in determining how these facts should be
6 weighed. In that case, the Ports Authority’s board was appointed by the Governor, subject to
7 advice and consent by the Senate and the board had a duty to report to the legislature and the
8 governor. *Aguon*, 316 F.3d at 903-904. In addition, the court noted that “none of the far-
9 reaching powers vested in the board is subject to prior government approval.” *Id.* at 904.
10 Despite this “far-reaching” power, the *Aguon* court found that “the fifth factor weighs neither
11 for nor against [the Ports Authority’s] status as an arm of the Commonwealth” because the
12 “Commonwealth’s power over the make-up of the board” balanced out “the board’s authority to
13 exercise its wide-ranging powers without prior government approval. *Id.*


14 Contrast this with the situation of CDA. Like the Ports Authority, CDA’s board is filled
15 through appointment by the Governor and confirmation by the Senate. Unlike the Ports
16 Authority, some of CDA’s powers are subject to “prior government approval,” including certain
17 expenditures, and, more importantly, its “objectives and priorities.” Taken together, these facts
18 lean in favor of a finding on the fifth factor, the corporate status element, that CDA is an arm of
19 the government for the purpose of § 1983 immunity.

20 V. CDA is an Arm of the Government for the Purpose of § 1983 Immunity

21 Based on the analysis above, the first two, most important factors point toward a finding
22 that CDA is an arm of the government and fifth factor does as well. The fourth factor does not
23 point in either direction. Only the third factor points against. Therefore, it is the position of the
24 Office of the Attorney General that the Commonwealth Development Authority is an arm of the
25 Commonwealth Government for the purposes of extending § 1983 sovereign immunity.

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2 Date: March 22, 2006.

3 Respectfully submitted,
4 OFFICE OF THE ATTORNEY GENERAL

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6 By: 
7 Benjamin L. DeMoux
8 Assistant Attorney General
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